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Utah Supreme Court

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In the
Supreme Court of the State of Utah

FILED

W. P. ROGERS and MAGNA MINING
COMPANY, a New Mexico Corpora-
tion,
Plaintiffs and Respondents,

vs.

UNITED WESTERN MINERALS
COMPANY, a Delaware Corporation,
Defendant and Appellant.

CLERK, Supreme Court, Utah

Case No.
8787

BRIEF OF PLAINTIFFS AND RESPONDENTS

Appeal from the District Court of the Sixth Judicial
District, in and for the County of Garfield,
State of Utah

Honorable John L. Sevy, Jr., Judge

OLSEN AND CHAMBERLAIN,
Richfield, Utah,

*Attorneys for Plaintiffs,
and Respondents.*

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BRIEF OF PLAINTIFFS AND RESPONDENTS

STATEMENT OF FACTS

The plaintiffs and respondents will be referred to as “respondents;” the defendant and appellant will be referred to as “appellant.”

The appellant’s Statement of Facts is substantially accurate to the extent it has gone; however, appellant has understandably omitted any reference in its statement and exhibits to an amendment to the sale contract which is so

controlling that it alone, we submit, justifies the decision of the Lower Court.

We respectfully invite the Court's attention to the Appendix hereto (Exhibit I) where there appears a letter agreement admitted in the pleadings (R. 29) proposed by appellant and accepted by respondents by the terms of which *the appellant requested and received a postponement of the commencement of the obligation to pay monthly installments which obligation it now contends is non-existent.*¹

While we submit that by the clear language of the original agreement appellant has unqualifiedly undertaken to pay the minimum monthly installments for which judgment was taken in the Lower Court, this amended portion of the agreement gives strong additional support to the judgment, since it is fundamental that in the interpretation of a contract disputed as to its effect a practical construction placed by the parties upon the agreement is the best evidence of their intent *Hardinge Company vs. Eimco Corp.*, 1 Utah 2d 320, 266 P. 2d 494. *Universal Sales Corp. vs. California Press Manufacturing Company*, 128 P. 2d 665, 20 C. 2d 751.

We propose to show that the first integrated contract is susceptible of no other interpretation than that placed on it by the Lower Court without reference to this document. The amendment is, however, a part of the agreement

¹See next to last paragraph of letter agreement (Exhibit I). In paragraph 3 of the original agreement (R. 4), the appellant undertook to commence the minimum contract payments six months after date of the agreement (August 4, 1955) making the first installment due February 4, 1956. The amendatory letter agreement extends this date to April 4, 1956.

in dispute and within its four corners and is to be considered whether or not the Court determines there is any ambiguity. As appellant declared in its brief we admit and still insist that the contract is not ambiguous.

STATEMENT OF POINTS

POINT I.

THE COURT PROPERLY DENIED THE MOTION TO DISMISS.

POINT II.

THE COURT PROPERLY RULED THAT IT WAS IMMATERIAL WHETHER OR NOT MINERALS OR ORES COULD BE PRODUCED FROM THE MINING CLAIMS.

POINT III.

THE COURT MADE PROPER FINDINGS, CONCLUSIONS, AND JUDGMENT.

POINT IV.

THE RESPONDENTS MADE A PROPER ELECTION OF REMEDIES.

ARGUMENT

ARGUMENT ON POINTS I, II, AND III

POINT I.

THE COURT PROPERLY DENIED THE MOTION TO DISMISS.

POINT II.

THE COURT PROPERLY RULED THAT IT WAS IMMATERIAL WHETHER OR NOT MINERALS OR ORES COULD BE PRODUCED FROM THE MINING CLAIMS.

POINT III.

THE COURT MADE PROPER FINDINGS, CONCLUSIONS, AND JUDGMENT.

We agree that the contract must be analyzed in its entirety; that the Court cannot rewrite it; and that the contract must receive a reasonable interpretation. We are confident, however, that the parties indulged in none of the highly academic refinements of logic and grammar expressed in appellant's brief.

We will attempt to show that the interpretation of the Lower Court gave effect to and harmonized all of the provisions of the disputed agreement; that the contrary would be true should the appellant now prevail. We propose to

divide the argument on these combined points into two parts: 1, the practical construction of the court below, and 2, the impracticality of that appellant seeks.

1. THE PRACTICAL CONSTRUCTION PLACED ON THE AGREEMENT BY THE LOWER COURT:

Read in its entirety and as written by the parties, the Trial Court attached to the sale contract its only reasonable interpretation by finding that the following were its salient provisions:

A. This was a *sale*—as opposed to a lease—by which the appellant covenanted to buy and the respondents covenanted to sell the mining claims for a fixed and definite amount (R. 3, para. 2).

B. That respondents did not—as no rational person would do—hazard the risks involved in guaranteeing the presence of a body of ore.

C. That any reference to payments “out of production” referred only to the *rate* of payment; not the total amount.

D. Most importantly, that the appellant had an unqualified obligation to produce—as distinguished from prospect or operate—said claims in order to alter its obligation to pay \$500.00 per month.

The appellant in its brief has misstated the ruling of the Trial Court in asserting under Point III of its brief that

the Court made a finding that “performance of work in mining said claims” would not relieve appellant of the monthly obligation. The Court did not so order (R. 32). The appellant has done no “mining” but placed in evidence the fact that they had only explored or prospected the claims. They admitted that they had produced no ore (R. 134). Throughout the contract, the language is that appellant is obliged to pay \$500.00 per month in lieu of *mining* and *producing* said claims. The verb “mine” means to “produce minerals” and is not synonymous with explore, develop, prospect, or expend money upon, mining claims. The word “mining” contemplates the extracting of valuable minerals. *Nephi Company vs. Juab County*, 33 Utah 114, 93 P. 53. See also *American Mining Law, 4th Edition*, Vol. 1, page 27 and note 181.

The parties clearly contemplated this situation:

1. Ore may or may not be present.
2. If it is present and is diligently and continuously mined by appellant, then respondents would accept, against the total purchase price, 15 per cent of the gross value thereof whatever that should be.
3. If there is no ore present, *or* if ore is present and appellant elects not to mine it, appellant is required to pay \$500.00 a month to apply upon the contract balance.
4. The parties expected that there might be ore present. If there were, the seller would have been entitled to a more rapid payment of his obligation.

Under these circumstances, the proviso quoted by the appellant at page 9 of its brief:

“* * * so that buyer shall have the obligation of either continuously mining and operating said claims so long as ore or minerals can be produced therefrom in commercial quantities, or if it fails to do so, shall pay sellers the sum of \$500.00 each and every month in lieu of production. * * *.”

assumes perfect reason: when appellant wasn't mining the claims, it would have to pay. If appellant were excused, as it now claims, by absence of ore, why would there have been added the sentence which appellant omitted to include ending the proviso which it quoted:

“The sum of \$500.00 per month so paid shall be credited upon the unpaid balance of the purchase price.”

for the reason that it would then be immaterial what balance remained since nothing would be due.

Every contractual provision must be given some meaning (*Gates vs. Daines*, 3 Utah 2d 95, 279 P. 2d 458) and this provision can have none if appellant's view is correct.

5. The appellant, however, could mine and produce the claims, and the respondents, in the interest of early development and accelerated payment of the balance, would go along with actual *mining* activity in lieu of \$500.00 per month, *so long as ore could be produced from the claims in commercial quantities*. The Seller (respondents) would not tolerate a sham “mining” operation to be continued upon the claims to reduce his monthly payment after it was de-

terminated that commercial quantities of ore could not be recovered. In this connection it is important to note that the respondents, when the mine was *producing*, would receive only 15% of the gross mineral production whether that were more or *less* than \$500.00 per month (R. p. 4, para. 3 of the contract and R. p. 104 and page 9 of appellant's brief as to agreed statement by counsel regarding this point). Reading the proviso again:

“The buyer at its *option* may pay \$500.00 per month after six months from the date of this agreement in lieu of working and mining said claims so that buyer shall have the obligation of either continuously mining and operating said claims so long as ore or minerals can be produced therefrom in commercial quantities, * * *.”

Thus giving Buyer the option to determine which it shall do *only* during that period within which commercial production can be realized.

This, we submit is the only reasonable interpretation of the agreement and the only one under which all the provisions of the agreement can be harmonized and given effect.

2. THE IMPRACTICALITY OF THE INTERPRETATION SOUGHT BY APPELLANT:

The appellant contends that in order to prevail the respondents should have been required to plead and prove the existence of a body of commercial ore. Appellant is saying that the Seller, in order to recover the purchase price of the claims, must prove that he has sold the Buyer an ore

body sufficient in size and value to pay the full purchase price out of 15 per cent of its production. The minute 15% of production failed to satisfy the contract balances the obligation stops. If this view is adopted, what possible value can the provision for a minimum \$500.00 monthly payment have?

The appellant also is contending that the respondents, having conveyed and completely divested themselves of ownership of the claims,² are subject to condition upon recovery of the balance of the consideration which condition is wholly within the power of the appellant to fulfill or not to fulfill. In other words, would any reasonable person convey title to mining claims, or any other property, with a balance remaining which was to be paid at a minimum rate of \$500.00 per month, but confer on Buyer absolute control over the property with the provision that should it not see fit to make the property productive, the unpaid purchase price would be forgiven. This construction not only neutralizes all effect of the minimum provision for payment of \$500.00 per month, it also militates against sound reason.

The construction argued by the appellant would abrogate all of the following provisions of the agreement:

- i. The provision for a fixed, definite, consideration.
- ii. That something be paid each and every month (either \$500.00 or 15% of a bona-fide and producing *mining* operation).

²Respondent conveyed the claims on acceptance of title (R. 5, paras. 7, 8, 9).

- iii. That the Sellers may, *at their option*, either retake the claims or pursue any other remedy they may have at law (para. 10 of the agreement) in event of buyer's default.
- iv. The provision for any payment further than the down payment, since thereafter the entire contract would, if interpreted as urged by appellant, become illusory, without mutuality of agreement, since nothing else would be required of appellant. In this connection see *Ross vs. Producers Mutual Ins. Co.*, 4 Utah 2d 396, 295 P. 2d 339, holding: "Wherever possible, a contract should be so construed that there are mutually binding promises on each party.
- v. The provision that the contract is to effect a *sale* of the properties.
- vi. The provision that the Seller is to receive \$500.00 per month under *any* circumstances.

We respectfully submit that the contentions of appellant fall squarely within the interdiction of Section 236 (a) of the American Law Institute's Restatement of the Law of Contracts which states:

"An interpretation which gives a reasonable, lawful and effective meaning to all manifestations of intention is preferred to an interpretation which leaves a part of such manifestations unreasonable, unlawful or of no effect."

POINT IV.

THE RESPONDENTS MADE A PROPER ELECTION OF REMEDIES.

We fail to see in this action any issue regarding election of remedies.

At the time of the pre-trial the appellant demanded that the respondents elect which remedy they would pursue (R. 117). Considerable discussion followed and an election was made by plaintiffs (R. 124) to pursue the remedy which resulted in the award by the Court below.

The Court allowed the election of the respondents and entered it into the pre-trial order (R. 31).

We admit that an election was required at the time of pre-trial. The appellant seems to be saying that where inconsistent remedies are asked, the plaintiff cannot recover under either. This argument does not comport with Rule 8 (e) (2) URCP allowing a pleader to state inconsistent claims for relief.

The ruling of the Trial Court in its pre-trial order amounted to an amendment to the pleading by leave of the Court. Rule 16 (2) states:

“In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider: * * *

“(2) The necessity or desirability of amendments to the pleadings. * * *”

We are confident the appellant is not serious in its contention that the respondents did not make a suitable election of remedies.

CONCLUSION

We respectfully contend that the Trial Court placed upon the agreement the only reasonable and rational interpretation it is susceptible of receiving; that every provision was given meaning to effect harmony with every other provision, and that the Court properly ordered at conclusion of the pre-trial that respondents were entitled to pursue the remedy on which the Court awarded judgment.

Respectfully submitted,

OLSEN AND CHAMBERLAIN,

*Attorneys for Plaintiffs,
and Respondents.*

APPENDIX
EXHIBIT I

UNITED WESTERN MINERALS COMPANY

136 West Palace Ave.

Santa Fe, New Mexico

November 2, 1955

Mr. W. P. Rogers and Magna Mining Company

Farmington, New Mexico

Gentlemen:

We have today accepted the title to the federal mining claims designated as Coleman Canyon group and Phoebe group, situate in Garfield County, Utah. The terms of the agreement, dated August 4, 1955, call for the following consideration payable by United Western Minerals Company, in addition to the amount of \$125,000 to be paid out of 15% of the gross mineral production from the Coleman Canyon group of claims.

The consideration of the Coleman Canyon group, in addition to the above mentioned payment out of mineral production, is \$15,000 in cash and \$15,000 in cash or common stock of our company, valued at \$1.00 per share.

The consideration for the Phoebe group is \$6,300, payable in cash or common stock of our Company, valued at \$1.00 per share.

We have elected to pay \$15,000 in cash, and \$21,300 in common stock, that is 21,300 shares of our common stock.

We have heretofore deposited \$3,000 with the First National Bank as escrow agent. This amount of \$3,000 will be released to you by our Company.

There remains a cash balance of \$12,000 payable to you by United Western Minerals Company. The balance of \$12,000 will be paid in the following manner, \$2,000 by our check, \$5,000 within thirty days and \$5,000 within sixty days from the date of this letter.

The release of the escrow deposit of \$3,000, the payment of \$2,000, and the issuance of 21,300 shares of common stock will be made upon delivery to our Company of satisfactory mining deeds to the Coleman Canyon group and the Phoebe group of claims.

The date for the beginning of payments out of gross mineral production, provided for in clause 3 of the Agreement of August 4, 1955, will be postponed until April 4, 1956.

Kindly signify your approval of the foregoing terms for payment of the consideration payable under the Agreement of August 4, 1955, by signing the endorsement at the foot of this letter.

Sincerely yours,

/s/ Alva A. Simpson, Jr.

ALVA A. SIMPSON, JR.

President

AAS/ar

APPROVED:

MAGNA MINING CO.

/s/ W. P. Rogers

By: /s/ W. P. Rogers

W. P. Rogers

Gen. Mgr.